FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 30 1938
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA,

Appellant,

vs.

UNITED ARTISTS CORPORATION, A CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM.

CLARENCE W. MEADOWS,
Attorney General of West Virginia,
FORREST B. POLING,
Assistant Attorney General,
W. HOLT WOODDELL,
Assistant Attorney General,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Appellant's brief in opposition to the motion to affirm	1
Statement as to the case and the facts	1
Points to be relied upon in opposition to motion to affirm	3
Summary of argument	4
Appellee is doing business in West Virginia	5
Appellee is not engaged in interstate commerce relative to the activities sought to be taxed	9
The tax is not an invalid burden upon interstate commerce	11

Table of Cases Cited.

Binderup v. *Pathe*, 263 U. S. 291	4, 10
Browning v. *Waycross*, 233 U. S. 16	4, 10
Carson Petroleum Co. v. *Vial*, 279 U. S. 95	5, 11
Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366	5, 11
Flint v. *Stone Tracy Company*, 220 U. S. 107	4, 6
General Railway Signal Co. v. *Va.*, 246 U. S. 500	4, 10
Hart Refineries v. *Harmon*, 278 U. S. 499	5, 11
Henneford v. *Silas Mason Co.*, 300 U. S. 577	5, 11
Hughes Brothers Timber Co. v. *Minn.*, 272 U. S. 469	5, 11
Monamotor Oil Co. v. *Johnson*, 292 U. S. 86	5, 11
Nashville, Chattanooga & St. Louis Railway v. *Wallace*, 288 U. S. 249	5, 11
New York Life Insurance Co. v. *Deer Lodge County*, 231 U. S. 495	4, 11
Paramount Pictures Distributing Co. v. *Henneford*, 184 Wash. 376, 298 U. S. 665	4, 10
Paul v. *Va.*, 8 Wall. 168	4
Underwood Typewriter Co. v. *Piggott*, 60 W. Va. 532	4, 6
United Shoe Machinery Co. v. *United States*, 258 U. S. 451	4, 7
United Shoe Repairing Machine Co. v. *Carney*, 116 W. Va. 224	4, 6

Page

United States v. *Paramount Famous Lasky Corp.*, 34 F. (2d) 984, 282 U. S. 30 ..... 4, 10
Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503 ... 4, 5
Western Oil Co. v. *Lipscomb*, 244 U. S. 346 ..... 4, 7

STATUTES CITED.

Acts of the West Virginia Legislature, Regular Session, 1935, Chapter 86, Section 2-(i), amending Section 2, Article 13, Chapter 11, Code of West Virginia, 1931, as amended by Section 2, Article 13, Chapter 33, Acts of the Legislature, First Extraordinary Session, 1933 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 161

ERNEST K. JAMES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ACTING TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA,

Appellant,

vs.

UNITED ARTISTS CORPORATION, A CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM.

Statement as to the Case and the Facts.

Although a stipulation of facts has been entered into relative to this cause, in order to more clearly define the position of the appellant in opposing appellee's motion to affirm, it is believed well to point out certain of said facts which appear to be of special significance and weight relative thereto.

The appellant State Tax Commissioner has asserted the right to collect from the appellee, United Artists Corpora-

tion, a tax of one per cent of the gross proceeds received by appellee by reason of the exhibition in the State of West Virginia of certain of its films. This claim is based upon the following State statute (Chapter 86, Acts of the Legislature, Regular Session, 1935, Section 2-(i), amending Section 2, Article 13, Chapter 11, Code of West Virginia, 1931, as amended by Section 2, Article 13, Chapter 33, Acts of the Legislature, First Extraordinary Session, 1933), the pertinent part of which reads as follows:

> "Upon every person engaging or continuing within this state in the business of collecting incomes *from the use of real or personal property or of any interest therein, whether by lease, conveyance or otherwise,* and whether the return be in the form of rentals, royalties, fees, interest or otherwise, the tax shall be one per cent of the gross income of any such activity: * * *." (Italics ours.)

The three judge court convened for the hearing of the case permanently enjoined the collection of this tax on the grounds (1) that appellee was not engaged in doing business in the State of West Virginia, and (2) that the activities of the appellee constitute "interstate commerce."

The appellee is a Delaware corporation with its chief office in New York City. It distributes to exhibitors and theater owners throughout the State of West Virginia and elsewhere motion picture films, and charges said exhibitors and theater owners various prices for the privilege of exhibiting said films. It has no branch office in West Virginia, and owns no property therein, with the exception of said films while they are in said State. The exhibitors must, under the terms of their licenses to exhibit said films, return same to the appellee, or one of its branches, or make shipment thereof to some other person as directed by appellee. The films are usually shipped by appellee from without the State, and are eventually returned to appellee without the State.

After the contract of license is entered into, appellee ships its films to the various exhibitors in the State of West Virginia, where they are received by said exhibitors, and then exhibited in their theaters for varying periods. The license provides that the exhibitor will pay the appellee for this right to so exhibit said films. These payments are sometimes fixed as a specified sum of money, and sometimes as a specified percentage of the receipts from theater admissions during the day or days when said picture is exhibited, in which case, said specified percentage of the receipts as payment for the license to so exhibit said films are designated as trust funds, and the exhibitor is made the trustee and collector thereof, and the same becomes the exclusive property of the appellee the moment paid into the box office.

Further reference to the stipulation and the contract of license governing the use and display of said films in West Virginia reveals the full extent of appellee's activities in West Virginia, as well as the great measure of control it exercises over the exhibition of said films therein, and the collection of rents and license fees therefor after the films have been received by the exhibitor or theater owner in West Virginia; and during the time same remain in said State.

Points to be Relied Upon in Opposition to Motion to Affirm.

POINT I.

Appellee is engaged in doing business in the State of West Virginia so as to be subject to the provisions of the taxing statute sought to be invoked.

POINT II.

Appellee is not engaged in interstate commerce relative to the local exhibition of its films in West Virginia, which is the sole activity sought to be taxed.

Point III.

The tax sought to be imposed does not place an invalid burden upon interstate commerce, said commerce being purely incidental to a local activity in this State.

Summary of Argument

I.

Appellee is doing business in West Virginia.

Von Baumbach v. *Sargent Land Co.*, 242 U. S. 503, at page 516;

Flint v. *Stone Tracy Company*, 220 U. S. 107;

Underwood Typewriter Co. v. *Piggott*, 60 W. Va. 532;

United Shoe Repairing Machine Co. v. *Carney*, 116 W. Va. 224;

United Shoe Machinery Co. v. *United States*, 258 U. S. 451;

Western Oil Co. v. *Lipscomb*, 244 U. S. 346.

II.

Appellee is not engaged in interstate commerce relative to the activities sought to be taxed.

Binderup v. *Pathe*, 263 U. S. 291;

United States v. *Paramount Famous Lasky Corp.*, 34 F. (2d) 984, affirmed by this Court 282 U. S. 30;

Paramount Pictures Distributing Co. v. *Henneford*, 184 Wash. 376, certiorari denied 298 U. S. 665;

General Railway Signal Co. v. *Va.*, 246 U. S. 500;

Browning v. *Waycross*, 233 U. S. 16;

N. Y. Life Insurance Co. v. *Deer Lodge County*, 231 U. S. 495;

Paul v. *Va.*, 8 Wall. 168.

III.

The tax is not an invalid burden upon interstate commerce.

Monamotor Oil Co. v. *Johnson*, 292 U. S. 86;
Hart Refineries v. *Harmon*, 278 U. S. 499;
Nashville, Chattanooga & St. Louis Railway v. *Wallace*, 288 U. S. 249;
Henneford v. *Silas Mason Co.*, 300 U. S. 577;
Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366;
Hughes Brothers Timber Co. v. *Minn.*, 272 U. S. 469;
Carson Petroleum Co. v. *Vial*, 279 U. S. 95.

ARGUMENT.

I.

Appellee is Doing Business in West Virginia.

The question of whether or not a corporation or individual is doing business in a particular State so as to become amenable to taxation by that State depends upon the facts of each particular case, hence no set rule can be laid down as fully governing. As was said in the case of *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, at page 516: "It is evident, from what this Court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court." In that case certain realty corporations were engaged in handling tracts of land owned by such corporations, leasing and selling parcels thereof, disposing of stumpage, and seeing that their lessees under mining leases lived up to their contracts. The court there held that said corporations were engaged in business in the particular State within the meaning of an Act in said State imposing an excise tax measured by annual net income upon the doing or carrying on of business in a corporate or quasi-corporate capacity. This

question was also dealt with by this Court in the case of *Flint* v. *Stone Tracy Company*, 220 U. S. 107, wherein a tax was assessed upon the privilege of doing business in a corporate capacity. The Court held that one of the corporations engaged in the management and leasing of a hotel was engaged in doing business in the State, as well as was another which owned and leased ore lands for the purpose of carrying on mining operations and received therefor a royalty depending upon the quantity of ore mined. The court there said that the term "business" is "that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." These cases and those cited therein fully demonstrate that this Court has never laid down a strict or unbending rule by which to judge whether or not any certain activity comes within the term "doing business" within a particular State. It depends upon the facts in each case.

The appellee contending it is not doing business in West Virginia cites *Underwood Typewriter Co.* v. *Piggott*, 60 W. Va. 532, and *United Shoe Repairing Machine Co.* v. *Carney*, 116 W. Va. 224. It is respectfully submitted that these cases are not in point and hence do not control. The Piggott case merely involved the sale and delivery by a foreign corporation of typewriters in this State, upon orders taken therefor by its agents and traveling salesmen, and forwarded to it, *and involved no activity on the part of the foreign corporation after the goods had been received in West Virginia, and after interstate commerce had ceased.* The *Carney* case, *supra*, involved a Maine corporation which had licensed persons in West Virginia to use certain shoe machinery, for which the lessee paid the lessor certain rentals. The Court pointed out *that under the facts shown* the activities conducted by the Maine corporation in the State of West Virginia appeared to be purely of an interstate character, but further

observed that a foreign corporation does business within this State when it engages in corporate activities of a local character, which are wholly separate from interstate commerce, and said that the defendant's plea therein did not contain sufficient averments to show clearly that the corporation's business was of that character. The only allegations implying local transactions were that the agreement was entered into this State to use certain machines which were located within the State, and did not show in any way the extent of local activities. The facts in the instant case are entirely different and reveal a local activity much broader in scope and far reaching in effect.

The case of *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, cited by appellee, involved a monopolistic practice alleged to be in violation of the Clayton Act, and the decision in that case did not in any manner rest upon the doing of a purely local business within a State.

The case of *Western Oil Co.* v. *Lipscomb*, 244 U. S. 346, cited by appellee, merely involved the shipment by a foreign corporation into a State of certain merchandise to fill orders taken by its traveling salesmen, a case not at all comparable to the present one.

The activity which the State of West Virginia seeks to tax in the instant case is wholly disassociated from interstate commerce. When the films reach the State of West Virginia interstate commerce entirely ceases, and does not begin again until they are shipped out of said State. The State of West Virginia does not seek to tax any operation had in interstate commerce, but only that activity which is carried on locally. The distributors receive the films in West Virginia, open the packages, take the films therefrom and then exhibit the same upon their screens throughout the State, wholly local exhibitions. In so doing the value thereof is consumed at that particular place in said State, to the same effect for all practical purposes, as would be

in the case of the use of any perishable commodity. In and about doing this, and it is for this right to exhibit that the appellee is paid, the appellee exercises a marked degree of control and supervision over the use of said films while in West Virginia. Its representative spends approximately one-half of his time in this State to procure orders for these films, and, doubtless, in the course thereof sees to it generally that his principal's business and interests are taken care of. The appellee has on several occasions checked various theaters in said State relative to the amount of admissions paid, so as to determine whether or not it has been receiving its just share of the rentals for its pictures. The contract of license relative to the exhibition of its films in West Virginia, in cases where the same are licensed on a percentage basis, designates the exhibitor as a trustee of the funds coming into his hands from admissions which are to be paid to the appellee as a license fee for the exhibition thereof, and compels the exhibitor in West Virginia to set aside appellee's share of said admissions and to hold them separate and apart for appellee. The appellee has the right, for a period of one year after any exhibition, to examine the exhibitor's books and records for the purpose of verifying any statement as to receipts, where the picture is shown upon a percentage basis. The exhibitor in West Virginia, to a great measure, is subject at all times to the instructions of appellee relative to the disposition of the film while in West Virginia, and when the exhibition is concluded the exhibitor acts for the appellee in the return of said film or the shipment to some other party within or without this State. The exhibitor may exhibit a particular film for a period longer than that which is contracted for by securing from the appellee, while the film is in West Virginia, and without further shipment or movement thereof, permission so to do. A full inspection of the contract of license entered into in such cases, taken in con-

nection with the real purpose for which the film is used, undoubtedly reveals that its whole value, and that for which the appellee receives its rentals or fees is directly connected with and dependent upon the local exhibition of the film. That is the activity in which both parties are interested most vitally, and the activity in which the appellee exercises its most stringent control and supervision, all purely local in character, and most certainly a doing of a local business.

II.

Appellee is Not Engaged in Interstate Commerce Relative to the Activities Sought to be Taxed.

As heretofore pointed out, the position of appellant is to the effect that any interstate commerce, in whatsoever manner connected with the transactions here involved, is entirely disassociated from and purely incidental to the activity which the State of West Virginia seeks to tax. It is true that the mere taking of an order and the shipping into this State of an article, without further supervision or control over said article or its use in West Virginia, would be purely interstate commerce; however, when the films reach the exhibitors in West Virginia, interstate commerce ceases, and use from that point on up until they are shipped out of the State of West Virginia, if so, is a purely local use, and the local use of said films is that for which the appellee is paid; is that in which both parties are vitally and primarily interested. It is of no consequence as to how the exhibitor receives a film, whether in interstate commerce or intrastate commerce, as he well may do, but the whole use of the film and the entire activity sought to be taxed is the showing of that film in West Virginia. The tax is denominated as one imposed upon the collecting of incomes *from the use of real or personal property whether by lease, conveyance or otherwise, and whether*

the return be in the form of rentals, royalties, fees, interests or otherwise.

Counsel for appellee cite as authority for the argument that its business is wholly of an interstate character the cases of *Binderup* v. *Pathe*, 263 U. S. 291; *United States* v. *Paramount Famous Lasky Corp.*, 34 F. (2d) 984, affirmed by this Court 282 U. S. 30, and *Paramount Pictures Distributing Co.* v. *Henneford*, 184 Wash. 376, certiorari denied 298 U. S. 665. It is believed that a strict analysis of the holding of the courts in those cases clearly reveals that the principles there enunciated are not controlling as to the present question. The cases of *Binderup* v. *Pathe, supra,* and *United States* v. *Paramount Famous Lasky Corp., supra,* involved the question as to whether or not certain film distributors were engaged in unlawful practices in violation of the Sherman Anti-Trust Act. The question of their activities locally in the actual exhibition of the films was not passed upon, nor was it the subject of discussion. It is true that they are authority for the proposition that in the pure distribution of films they are engaged in interstate commerce, so as to become subject to the terms and conditions of the Sherman Anti-Trust Act, but their activities after distribution is completed, and when exhibition of the film begins is not the subject of discussion in said cases, and was not passed upon. The State of West Virginia is not presuming to tax the act of distribution, but seeks only to tax those activities carried on within the State, after actual distribution and interstate commerce has ceased.

It is well settled that a State is empowered to tax a local activity which is separate and distinct from the transportation and intercourse which is interstate commerce if the ordinary course of the business induces such interstate transportation. *General Railway Signal Co.* v. *Va.*, 246 U. S. 500, *Browning* v. *Waycross*, 233 U. S. 16, and that the mere formation of a contract between persons in different States

is not within the protection of the commerce clause. *N. Y. Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, *Paul* v. *Va.,* 8 Wall. 168.

III.

The Tax is Not an Invalid Burden Upon Interstate Commerce.

While it is true that the State cannot by a tax place a direct burden upon interstate commerce, it appears to be equally as true that a State may tax an activity of a local character, even though such tax may in a sense burden interstate commerce to some degree, where the tax is nondiscriminatory. In the case of *Monamotor Oil Co.* v. *Johnson,* 292 U. S. 86, involving the tax upon motor vehicle fuel used or sold or otherwise disposed of within the State, the Court there held that the tax fell upon the local use of gasoline after interstate commerce had ended, just as the State of West Virginia asserts the right to tax the local use of the films based upon the receipts therefrom, after interstate commerce has ended. To the same effect is the case of *Hart Refineries* v. *Harmon,* 278 U. S. 499, and *Nashville, Chattanooga & St. Louis Railway* v. *Wallace,* 288 U. S. 249. See also the case of *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, holding valid a State tax on the use of personal property bought outside the State and shipped therein in interstate commerce. Where continuity of transit in interstate commerce has been broken, and the use to which property is put becomes local, the State may tax. *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366; *Hughes Brothers Timber Co.* v. *Minn.,* 272 U. S. 469; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95.

It is, therefore, respectfully submitted that appellee's motion to affirm should be denied, to the end that this Honorable

Court may note probable jurisdiction therein, and the case be then heard upon the merits thereof.

Respectfully submitted,

CLARENCE W. MEADOWS,
Attorney General of West Virginia;
FORREST B. POLING,
Assistant Attorney General;
W. HOLT WOODDELL,
Assistant Attorney General,
Counsel for Ernest K. James,
etc., Appellant.

(6441)